Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 97-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,

Petitioners,

vs.

DELORES SCOTT SULLIVAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* CARL KRESCHOLLEK IN SUPPORT OF RESPONDENTS

DAVID M. LINKER
Counsel of Record
FREEDMAN AND LORRY, P.C.
Attorneys for Amicus Curiae
400 Market Street, Suite 900
Philadelphia, Pennsylvania 19106
(215) 925-8400

150027

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Under Pennsylvania's Workers' Compensation Act, 77 Pa. Stat. Ann. §§ 531(5) and (6), workers' compensation insurers are permitted to withhold payments to health care providers during a utilization review to determine whether medical treatment was reasonable and necessary. The questions presented are:

I. Whether private companies providing workers' compensation insurance to private employers become "state actors" for purposes of the Due Process Clause when they elect to use a state-authorized utilization review procedure.

II. Whether the Due Process Clause requires workers' compensation insurers to pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	2
Conclusion	7

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Kreschollek v. Southern Stevedoring Company, 78 F.3d 68 (3rd Cir. 1996)	1, 2, 3, 6
Kreschollek v. Southern Stevedoring Company, et al., No. 93-3903 (D. N.J. September 30, 1997)	1, 2, 3, 6
Mathews v. Eldridge, 424 U.S. 319 (1975)	1, 2, 3
Statutes:	
77 Pa. Stat. Ann. §§ 531(5) and (6)	i
28 U.S.C. § 1331	1
33 U.S.C. § 901-950	1
United States Constitution:	
Fifth Amendment	1

INTEREST OF *AMICUS CURIAE*

Carl Kreschollek ("Kreschollek") is the plaintiff in an action under 28 U.S.C. § 1331 against the United States. Kreschollek alleges that the United States Department of Labor violated his Fifth Amendment right to due process when his employer and its workers' compensation insurance carrier suspended payments of indemnity compensation benefits paid to him under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 ("LHWCA") without first affording Mr. Kreschollek prior notice or a hearing. *See, e.g., Kreschollek v. Southern Stevedoring Company, et al.*, No. 93-3903 (D. N.J. September 30, 1997); *Kreschollek v. Southern Stevedoring Company*, 78 F.3d 868 (3rd Cir. 1996). The action is pending in the United States District Court for the District of New Jersey before United States Senior District Judge Joseph H. Rodriguez.

The United States has filed an amicus brief in support of petitioners in this case. The United States contends, in part, that it has an interest in the disposition of this case based on the similarity of issues herein and the issues in *Kreschollek*. *Kreschollek* contends that the arguments that the federal amicus have filed in this case relating to its analysis of the private interest component of this Court's balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1975) are inconsistent with the contentions presented to the District Court by the federal defendants in the LHWCA claim. Thus, our brief focuses on Issue Two of the Questions Presented.[1]

---

1. Pursuant to Supreme Court Rule 37.6, Kreschollek states that no counsel for a party authored this brief in whole or in part: and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. Written general consents to the filing of this and other amicus briefs in this proceeding have been lodged with the Clerk.

SUMMARY OF ARGUMENT

Mr. Kreschollek contends that a litigant in the federal courts – be it a private citizen or the federal government – has the duty to submit consistent positions on alleged similar issues when a party or amicus submits argument to a federal court. The federal amicus analogize the private interest in *Sullivan* in the uninterrupted payment of medical expenses to a commercial insurance dispute between a medical insurance carrier and its insured. The federal amicus further contend that the private interest in *Mathews*, i.e., the suspension of social security disability benefits prior to a pre-termination hearing, is *more* substantial than the private interests of the respondents in *Sullivan*. *See* Federal Amicus Brief at pp. 18, 24 & 28.

We contend that the aforecited analysis is inconsistent with the federal defendants' private interest analysis in *Kreschollek*. There, the federal defendants have argued that Mr. Kreschollek's "private interest" in the uninterrupted receipt of indemnity benefits under the LHWCA is a *less* substantial private interest than the private interest in the uninterrupted receipt of medical treatment. In light of this inconsistency, the federal amicus arguments in this case are without merit.

ARGUMENT

In the seminal case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court announced a three part test for determining whether a party's right to due process had been violated:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

Id. at 335.

The thrust of the federal amicus private interest analysis is that respondents private interest should be accorded less weight than the private interest of the social security disability recipient in *Mathews* since

> the insurer's temporary withholding of payment for a particular treatment does not affect the employee's disability status . . . *Mathews*, by contrast, involved a complete termination of disability benefits.

See Federal Amicus Brief at p. 28.

Ironically, the federal defendants in *Kreschollek* have accepted the Third Circuit's private interest analysis in its brief to Judge Rodriguez in *Kreschollek*. In an extensive discussion of Sullivan's applicability to the private interest issue in *Kreschollek*, the federal defendants argued:

> Application of the principles established in *Mathews v. Eldridge*, thus plainly demonstrate that due process does not entitle a Longshore claimant to a hearing before an ALJ before an employer terminates compensation payments that have been made voluntarily. The question remains whether such payments can be discontinued without prior

notice, which *Kreschollek* alleges also violates his constitutional right to due process (Prayer for Relief ¶2-3). *Kreschollek* may be expected to rely on the recent decision of the Third Circuit in *Sullivan v. Barnett* in support of this argument. In *Sullivan*, the Court reviewed a provision of the Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. §531(5) and (6) (West Supp. 1977) which allows employers or insurance carriers providing medical benefits to claimants receiving benefits under that statute, to request the state Bureau of Workers' Compensation ("the Bureau") to review a specific treatment ("utilization review") received by an employee. If that request is granted by the Bureau, the statute allows the employer/insurer to suspend payment for the medical treatment in question pending review. 139 F.3d at 163-164. Although the employee is given notice that the employer/insurer has filed a request for utilization review, neither the form request nor the notice that the case has been assigned to a group of health care professionals for review indicate that the employee's medical benefits may be terminated during review of the disputed treatment. 139 F.3d at 164. *Sullivan* complained that these "supersedeas" provisions of the Pennsylvania Act violated the procedural due process guarantees under the Fourteenth Amendment because it provides no notice to the employee that the employer/insurer can stop paying for the contested medical treatment pending review. *Id.* at 171. The *Sullivan* plaintiffs also challenged the constitutionality of the supersedeas provision for its failure to provide for an opportunity to be heard prior to the suspension of the medical treatment in question. *Id.* at 174.

On the issue of notice, the Court in *Sullivan*, observed that "the level of notice required before an individual is deprived of a constitutionally protected property interest depends upon the particular benefits at issue." 139 F.3d at 158 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972), "Due process is flexible and calls for such procedural protections as the particular situation demands."). In finding that the Pennsylvania Act provided insufficient notice of suspension of medical treatment, the court in *Sullivan* was particularly influenced by the nature of the benefit at stake – the uninterrupted provision of medical treatment for an injury severe enough to disable the employee for work. 139 F.3d at 158. This interest, the court found, was more akin to the receipt of welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254), and to the uninterrupted flow of utilities (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1) than it is to the purely pecuniary interest in the uninterrupted flow of disability compensation pending final administrative decision, for which, unlike medical treatment, there are adequate substitutes. *Mathews*, 424 U.S. at 340.

The interests of the recipient of medical treatment, welfare benefits and utilities who may not lose those benefits without the formal process of notice and opportunity to respond, are plainly distinguishable from the purely pecuniary interest of an employee who receives voluntary payments of compensation under the Longshore Act in an informal system that allows, as a form of quid pro quo, an employer to terminate those benefits without notice. In contrasting the situation of an employee

who is denied needed medical treatment pending review with that of an individual who is merely denied the receipt of disputed benefits, the Court stated (139 F.3d at 175);

> Although a monetary award may compensation an individual for financial losses, a monetary award cannot be deemed an adequate, effective, or appropriate substitute for relieving an employee's disability or pain. Nor can it be a substitute for necessary medical care.

These considerations, which the Court termed "a weighty and significant factor in the pre-termination calculus." (Id.) are wholly missing from the instant case. At 34-36 (emphasis supplied).

The flaw in the argument of the federal defendants in *Kreschollek* and the federal amicus in this case is their failure to understand that an injured worker's right to due process prior to the suspension of his medical or indemnity benefits are *both* important private interests. The United States trivializes these interests because it administers the LHWCA or, in some instances, acts as a self-insured under the LHWCA or its extensions. As such, the United States is not acting as a dispassionate friend of the Court in this case. Rather, the United States' views should be given the weight this Court would customarily apply to any special interest group that perceives a financial benefit in the outcome of a case.

CONCLUSION

The United States asserts it is generally interested in the faithful application of state action and due process principles. *See* Federal Amicus Brief at p. 1. We submit that this case constitutes the exception to the general rule.

For the reasons stated by Judge Garth, the Third Circuit's disposition of the questions presented in this case was faithful to this Court's state action and due process analysis and should be affirmed.

Respectfully submitted,

DAVID M. LINKER
Counsel of Record
FREEDMAN AND LORRY, P.C.
Attorneys for Amicus Curiae
400 Market Street, Suite 900
Philadelphia, Pennsylvania 19106
(215) 925-8400